

D.T.E. 01-95

Petition of Franklin W. Olin College of Engineering for approval to receive electric service  
from Wellesley Municipal Light Plant

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## I. INTRODUCTION AND PROCEDURAL HISTORY

On November 9, 2001, Franklin W. Olin College of Engineering (“Olin” or “College”) filed a petition with the Department of Telecommunications and Energy (“Department”) requesting a determination that it may receive electric distribution service from Wellesley Municipal Light Plant (“WMLP”),<sup>1</sup> rather than from Boston Edison Company d/b/a NSTAR Electric (“BECo”).<sup>2</sup> Olin seeks a determination, pursuant to G.L. c. 164, §1B(a),<sup>3</sup> that its campus lies within WMLP’s exclusive service territory or, in the alternative, that it has the right to choose WMLP as its electric distribution service provider (Petition at 1-2; Olin Brief at 6; Olin Reply Brief at 2).

On January 23, 2002, the Department granted the petitions to intervene of BECo and WMLP. The parties, together with Department staff, conducted a site visit of the Olin campus on March 28, 2002. Six days of evidentiary hearings were held between March 28, 2002 and April 26, 2002. Stephen Hannabury, Olin’s vice president for administration and finance, testified on behalf of the College. Jeffrey Niro, BECo’s account executive for Olin, and Amin Jessa, a lead engineer at BECo, testified on behalf of BECo. Richard Joyce, WMLP’s director, and Donald Newell, WMLP’s electric superintendent, testified on behalf of WMLP. The

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<sup>1</sup> WMLP is a municipal light department organized under St. 1891, c. 370, § 1, and G.L. c. 164, § 34.

<sup>2</sup> BECo is an electric company and a distribution company pursuant to G.L. c. 164, § 1.

<sup>3</sup> Alternatively, Olin seeks approval, pursuant to G.L. c. 164, § 47A(d), for WMLP to provide electric service to the College (Petition at 1-2).

evidentiary record consists of 316 exhibits and 15 record requests. BECo, Olin, and WMLP filed initial and reply briefs.

Olin is a higher education institution chartered by the Commonwealth of Massachusetts in 1997 (Olin Brief at 3). Any student admitted to Olin will receive a four-year scholarship for tuition and room (Exh. OC-1, at 1). Although construction of its campus was not complete, Olin began to offer classes at the start of the 2001 academic year (Exh. OC-1, at 1; Tr. 1, at 18). Currently, Olin has approximately 30 students, but anticipates a total enrollment of 650 students when fully operational (Tr. 1, at 23; Olin Brief at 3).

Olin is constructing its campus on a 70-acre parcel of land in the Town of Needham (“Needham”). Olin’s campus is adjacent to Babson College (“Babson”)<sup>4</sup> and the municipal boundary of the Town of Wellesley (“Wellesley”) (Exhs. BE-1-1A Att.; BE-1-1B Att.; BE-1-1C Att.). Olin’s campus parcel in Needham was purchased from Babson on March 7, 2000 (Exh. BE-1-4, Att.). The postal address of the College is 1735 Great Plain Avenue, Needham (Tr. 1, at 49). On October 31, 2001, Olin purchased an additional 1,000 square feet of land from Babson. This parcel is located in Wellesley, but abuts Olin’s 70-acre parcel in Needham (Exhs. BE-1-1A Att; BE-1-1B Att; BE-ARJ-4).

The deed transferring the property from Babson to Olin has six separate lot designations, used not to subdivide the parcel, but to designate the parcels in the deed

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<sup>4</sup> Babson’s campus is principally in Wellesley, but a portion of its contiguous campus, including structures and parking, straddles the Wellesley-Needham municipal boundary (Exhs. OC-1, at exhibit A; BE-1-4; BE-1-1A Att.; BE-1-1B Att.).

(Exh. BE-1-4). The lot at issue in this proceeding is designated as "Lot 2." When the property now in Lot 2 was owned by Babson, it was used as a parking lot and a road. Streetlights on Lot 2 received electric service from WMLP through facilities owned and operated by Babson in Wellesley (Exhs. WMLP-1, at 2-4; WMLP-2, Exh. 1; Tr. 2, at 237; Tr. 3, at 288-89; BECo Reply Brief at 14). The streetlights were removed during construction of the Olin campus in 1999 when a section of the parking lot was eliminated and the road was re-routed (Tr. 1, at 72).<sup>5</sup>

Olin is constructing several new buildings on Lot 2 (Exhs. BE-1-1, Att. 1-1A; BE-1-4; Olin Brief at 3-4). In January 2000, Olin began receiving temporary electric service from WMLP for its new buildings on Lot 2 (Exhs. BE-3-3; OC-2, at 16; Tr. 1, at 63). Olin receives electricity supplied by WMLP through distribution facilities owned, operated, and maintained by Babson (Exh. OC-2, at 16; Tr. 1, at 63). Olin now seeks to take permanent electric distribution service via a direct connection with WMLP on the Babson campus in Wellesley (Tr. 1, at 38). Olin's current electric load is approximately one megawatt, but is expected to grow to three or four megawatts over the next ten years (Tr. 1, at 22-23; Tr. 4, at 609-10; Tr. 5, at 814-15).

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<sup>5</sup> Babson allowed Olin to begin construction of its campus prior to the land conveyance in March 2000 (Tr. 1, at 109).

## II. POSITIONS OF THE PARTIES

### A. Olin

Olin argues that the area where its new buildings are located, though in Needham, is in WMLP's service territory. Olin contends that there has been no exclusive grant of right for either BECo or WMLP to serve the area in question (Olin Brief at 8). However, relying on G.L. c. 164, § 1B(a), which requires the Department to define service territories for each electric distribution company "based on the service territories actually served on July 1, 1997," Olin argues that it can take service from WMLP. Olin argues that its campus lies within WMLP's service territory because WMLP served Babson's streetlights on what is now Lot 2 on July 1, 1997 (Exh. WMLP-2, Exh. 1; Olin Brief Att. A; Olin Reply Brief at 7). Olin contends that its new buildings on Lot 2 are located in the same area where WMLP previously provided service to Babson's streetlights (Exhs. WMLP-1, at 2-4; WMLP-2, Exh. 1).

Olin argues that the Department's recent decision in Massachusetts Electric Company, D.T.E. 98-122 (2002), supports the proposition that municipal boundaries do not always equate to service territory boundaries. Where they do not, Olin argues that the Department should consider certain factors when deciding a service territory dispute, such as benefit to the customer, duplicate plant investment, and harm to ratepayers of either company (Olin Brief at 36-37).

If the Department does not agree that Lot 2 is in WMLP's service territory, Olin argues nevertheless that several factors support a Department determination that it has the right to choose WMLP as its electric distribution service provider (Olin Reply Brief at 5, 11). First,

Olin argues that WMLP's existing facilities are preferable to BECo's proposed infrastructure. Olin contends that WMLP's facilities are closer to the College's switchgear located at a central distribution point on the Babson campus and, therefore, will not require a system upgrade (Exh. BE-8-3). Olin argues that WMLP's existing underground circuit serving Babson also has the capacity to serve Olin's projected load (Olin Reply Brief at 21). In order to match WMLP's underground supply, Olin asserts that BECo would need to install a new circuit causing great disruption to Great Plain Avenue (Exhs. BE-ARJ-1, at 11; OC-1-10, at 2; Olin Brief at 21). Further, assuming that BECo could obtain the necessary easements and permits from Needham to construct its underground infrastructure, Olin argues that the time required to accomplish BECo's underground construction would be excessive (Exhs. OC-1-12; BE-JJN-1, at 12; Olin Brief at 21).

Second, Olin argues that it can achieve greater economic savings by taking distribution service from WMLP (Olin Reply Brief at 21). Olin contends that it will achieve significant cost savings by taking service from WMLP rather than BECo (Olin Brief at 17-18, 20). Olin alleges that it can obtain service from WMLP with an up-front cost only of approximately one percent of the cost of the most comparable BECo option, yielding an immediately savings to Olin of approximately \$1,600,000 (Olin Brief at 22). Additionally, Olin argues that its energy costs will be approximately 60 percent higher if it is required to take electric service from BECo (Exh. BE-8, Supp.; Olin Brief at 20). As a result, Olin contends that it would save \$400,000 to \$800,000 annually if it is permitted to receive electric service from WMLP (Exhs. BE-1-8; OC-1, at 6; Olin Brief at 20).

Third, Olin argues that taking service from WMLP allows it to implement collaborative activities with Babson that will yield efficiencies for both colleges. Olin alleges that both colleges are connected, and that each has legal rights on the other's campus. The two colleges have contracted for a common natural gas supply and are planning to coordinate various telecommunication and information technology services (Exh. BE-1-41; Olin Brief at 6). Olin contends that, if it is permitted to receive electric service from WMLP, it and Babson will be able to share various electric maintenance activities. Olin argues that this collaboration between the colleges is beneficial for both institutions (Olin Brief at 5).

Fourth, Olin argues that WMLP's electric service would be more reliable than BECo's electric service. Olin argues that WMLP's existing underground circuit is shorter than BECo's proposed underground circuit and, therefore, would have a lower expected failure rate (Olin Brief at 23). Also, unlike WMLP's service, Olin argues that BECo's proposed normal and back-up circuits both would originate from the same substation and would, therefore, both would be susceptible to problems affecting the substation (id.). Olin further argues that substation BECo proposes to use to serve the College has experienced voltage regulation problems (id. at 24). In addition, Olin argues that WMLP has a better record of service quality than BECo (id. at 25).

Finally, Olin argues that it intends to take service from WMLP at switchgear co-located with Babson's switchgear in Wellesley (Olin Brief at 41). Therefore, Olin argues that its receipt of service in Wellesley would not encroach on BECo's service territory in Needham (id.). Olin argues that it did not acquire land in Wellesley for the sole purpose of obtaining



service from WMLP. Rather, Olin argues that this electric system configuration is most efficient, and, therefore, it has a legitimate purpose for taking service in Wellesley (id. at 41-42).

B. WMLP

WMLP also argues that Olin's campus is located within WMLP's service territory. WMLP contends that it has been the only entity to supply electricity to the parcel that is now Olin's Lot 2 (WMLP Brief at 2). In determining whether Lot 2 is within WMLP's service territory, WMLP argues that the Department must consider, pursuant to the plain language of G.L. c. 164, § 1B(a), the circumstances that existed on July 1, 1997 (id. at 6). WMLP states that it was, through Babson, the actual provider of electric service to Lot 2 on July 1, 1997 (Exh. WMLP-1, at 2-3; Tr. 5, at 678-681; WMLP Brief at 6). WMLP acknowledges that, with the transfer of the property to Olin, the character of the service to Lot 2 changed from streetlights to new campus buildings. However, WMLP argues that because the statute addresses actual service to the property on July 1, 1997, G.L. c. 164, § 1B(a) does not permit the Department to consider changes in use or ownership of property after that date as a basis for determining service territories (WMLP Brief at 8-9). Arguing that it actually served Lot 2 on July 1, 1997, WMLP contends that Olin is within WMLP's service territory (Exhs. WMLP-1, at 2-3; BE-8-8; Tr. 5, at 678-683).

Even if the Department determines that Lot 2 is not part of WMLP's exclusive service territory, WMLP argues that Olin still has the right to choose its electric service provider (WMLP Brief at 21, WMLP Reply Brief at 2). Asserting that BECo failed to show any

exclusive right to serve Lot 2, WMLP contends that Olin is a “border customer” that can choose its electric distribution service provider (WMLP Brief at 22). Citing Ecological Fibers, Inc., D.P.U. 85-71 (1985), WMLP argues that the Department must consider factors such as the customer’s preference, the location of the facilities, the interconnection costs, and the rates of the competing utilities when resolving service territory disputes (id.). WMLP contends that the preferable location of its facilities, its lower costs, and its superior service quality support a Department determination that WMLP may serve Olin (WMLP Brief at 23).

C. BEC

BEC contends that it has the exclusive right to serve Olin as a new customer in Needham, arguing that the College is entirely within its service territory. BEC argues that it has been the historic provider of distribution service to Needham since 1903 (Exhs. OC-1-21, Supp. Att.; BE-JJN-1, at 15-16). BEC further maintains that it provided service to Needham on July 1, 1997, the date that exclusive service territories were confirmed by the Legislature through G.L. c. 164, § 1B(a) (BEC Brief at 15-16). BEC contends that Olin’s presence is exclusively in Needham; arguing that the College has a Needham address, that Olin’s water, gas, and sewer services all come from Needham providers, and, except for a 1,000-square foot parcel of vacant land purchased immediately prior to the filing of this case, that Olin’s entire campus is in Needham (BEC Brief at 7-9).

In addition, BEC argues that Olin and WMLP have failed to show that WMLP ever actually served Lot 2 in Needham and, therefore, have failed to show that the property in question is part of WMLP’s service territory. BEC alleges that Babson delivers power

throughout its own campus, including to the small portions of its campus located in Needham. In this same manner, BECo argues that Babson, and not WMLP, provided service to Lot 2 on July 1, 1997 (Exh. WMLP-1, at 2-3; Tr. 2, at 245). BECo argues that as of July 1, 1997, WMLP had no facilities or equipment in Needham and had no permission or consent to provide electric service in Needham (BECo Reply Brief at 2).

Arguing that Olin's campus does not straddle a municipal boundary, BECo contends that the College is not eligible to choose its distribution service provider (Tr. 1, at 19; BECo Brief at 8, 37, citing D.T.E. 98-122, at 11). BECo argues that Olin's request to take service from WMLP relies on an area in Needham that, when owned by Babson, received service for approximately twelve streetlights (Exh. BE-1-1A). BECo contends that the streetlights were removed and WMLP's electric service was discontinued before the property was conveyed to Olin, thus eliminating any "straddling customer" argument (Tr. 1, at 72; Tr. 2, at 237-238, 243; Tr. 5, at 703, BECo Brief at 9).

Finally, BECo argues that its service quality, reliability, and costs are not relevant to the Department's determination of which utility can serve Olin (BECo Reply Brief at 15).

Acknowledging that these issues might be relevant if Olin straddled a municipal boundary and had the right to choose its distribution service provider, BECo contends that such a fact pattern is not present here (BECo Reply Brief at 16).

### III. STANDARD OF REVIEW

The standard of review for electric distribution service territory disputes is provided by St. 1997, c. 164, § 193, inserting G.L. c. 164, § 1B(a) ("Restructuring Act"). Although

earlier Department precedent may remain instructive or useful in enforcing § 1B(a), statutory directive, rather than pre-Restructuring Act precedent, now controls the Department's decisions and exercise of discretion.<sup>6</sup>

General Laws c. 164, § 1B(a) directs the Department to define service territories for each electric distribution company "based on the service territories actually served on July 1, 1997, and following to the extent possible municipal boundaries." In adopting 220 C.M.R. § 11.04(2)(a), the Department discharged this directive. General Laws c. 164, § 1B(a) also imposes an "exclusive obligation" on each distribution company to serve retail customers in its defined service territory. Section 1B(a) further enjoins that "*no other person* shall provide distribution service" within a defined territory "without the *written* consent" of the incumbent distribution company and the filing of that consent with the Department and with the clerk of the municipality affected (emphasis added).

Thus, § 1B(a) expresses three related purposes. First, it directs the Department to define service territories along municipal boundaries. Second, it imposes an obligation to serve<sup>7</sup> on each electric distribution company. Third, it prohibits encroachment on a defined distribution service territory, absent the deliberate consent of the incumbent distribution

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<sup>6</sup> The Department has already distinguished earlier precedent from the superseding statutory mandate. See Massachusetts Electric Company, D.T.E. 98-122, at 7, 11, n.8 (2002) ("Department Order [in Ecological Fibers, Inc., D.P.U. 85-71(1985)] predates G.L. c. 164, § 1B (a), which clearly states Legislative policy").

<sup>7</sup> This codification of the obligation to serve is consistent with the Department's long-held view that "electric utilities must serve all load requirements and cannot curtail the addition of new customers." Boston Gas Company, D.P.U. 88-67, at 373 (1988).

company.<sup>8</sup> Even so, as the Department noted in a case of first impression under § 1B(a), the statute's wording (i.e., "following to the extent possible municipal boundaries") implicitly recognizes that ambiguous border situations existed in 1997, and may yet arise after more than a century of "patchwork quilt" electric system development. Massachusetts Electric Company, D.T.E. 98-122, at 6-7, citing Weld v. Board of Gas and Electric Light Commissioners, 197 Mass. 556, 559-60 (1908). Boundary situations may, therefore, require Department resolution, and G.L. c. 164, § 1B(a) affords some latitude for the exercise of discretion. However, restraint in exercising Department discretion is necessary to avoid eroding the statutory rule.<sup>9</sup> The Legislature has set out a straight-forward standard of review in § 1B(a) and the Department must adhere to that standard as closely as it can, while seeking to effect its purposes.

The Department exercised its discretion in a claim involving facts that long predated the relevant statutory date of July 1, 1997. In Massachusetts Electric Company, the Department found that a customer was entitled to choose between distribution service providers where its premises were an uninterrupted parcel straddling a municipal boundary. D.T.E. 98-122, at 7. The Department noted with particular importance that there was no evidence that the customer engaged in land conveyance or lot merger since July 1, 1997 to bring all or part the premises

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<sup>8</sup> This agreement may not be merely inferred from circumstances. It must be in written form and thus evidence deliberateness. G.L. c. 164 § 1B(a).

<sup>9</sup> The emphasis in D.T.E. 98-122, at 7-8 on fairness and the absence of contrivance makes it clear that the Department regards the exercise of discretion under § 1B(a) to depart from municipal boundaries as properly confined to good-faith claims.

into a different service territory in order to defeat the central intent of G.L. c. 164, § 1B(a).

Id. at 11. In such good-faith circumstances, the Department “has discretion to depart from municipal boundaries in resolving service territory disputes, *if* facts and fairness so warrant.”

Id. at 7 (emphasis in original). However, where record evidence establishes or supports a reasonable inference of “creative conveyancing” or other stratagem to circumvent the intent of § 1B(a), the customer will have a considerable burden to show that allowing the petition does not undermine Legislative intent. Id. at 8, 11.

In sanctioning the particular departure from municipal boundaries in Massachusetts Electric Company, the Department noted that its action resulted from the unusual facts found on that particular record. Id. at 10-11. Short of dividing the real property involved, a power the Department does not have, a departure from municipal boundaries was virtually unavoidable regardless how the decision went. Nonetheless, the outcome in Massachusetts Electric Company was circumscribed in deference to the straightforward policy premiss underlying § 1B(a), namely that the Legislature wanted to prevent and not to encourage conflict along distribution service territory boundaries and directed the Department to resolve conflicts in favor of observing municipal boundaries, save only where it is not “possible” to do so.

#### IV. ANALYSIS & FINDINGS

The Department must first determine whether the Olin campus lies within the exclusive service territory of BECo or WMLP. Each of the Commonwealth’s investor-owned utilities has historically distributed electricity over clearly-defined service territories. However, prior to

the passage of the Restructuring Act, it was unclear whether these service territories were exclusive. See Report to the General Court Pursuant to Section 312 of the Electric Restructuring Act, Chapter 164 of the Acts of 1997, at 37 (December 29, 2000) (“MBIS Report”). The enactment of G.L. c. 164, § 1B(a) resolved the issue in favor of service territory exclusivity. Id. at 35-36.

The Legislature, through G.L. c. 164, 1B(a), directed the Department to define exclusive service territories following the extent possible municipal boundaries, based on the service territories actually served on July 1, 1997. When determining service territory disputes, the Department will follow municipal boundaries where it is possible to do so without giving rise to anomalies. However, Department has a certain amount of discretion to depart from municipal boundaries in resolving service territory disputes, if facts and fairness so warrant. D.T.E. 98-122, at 7-8.

The municipal boundary between Wellesley and Needham has historically been the presumptive boundary between the service territories of BECo and WMLP. WMLP was formed in 1892 and provides electric service in Wellesley (Exh. WMLP-1 at 2; Tr. 2, at 184). Since 1903, BECo has provided electric distribution service to Needham. Significantly, BECo provided distribution service to Needham on July 1, 1997, a date relevant to this matter under G.L. c. 164, § 1B(a) and 220 C.M.R. § 11.04(2)(a) (Exhs. OC-1-19(A) Supp.; OC-1-19(B) Supp. Att.; OC-1-21, Supp. Att.; BE-JJN-1, at 15-16; OC-1-26).<sup>10</sup> BECo has extensive

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<sup>10</sup> WMLP currently provides service to three locations in Needham other than Babson (BECo Brief at 28-29; Olin Reply Brief at 19-20; WMLP Brief at 12; WMLP Reply (continued...))

distribution facilities, grants of location, and access to public ways necessary to serve customers in Needham (BECo Brief at 15-16).<sup>11</sup> With the passage of G.L. c. 164, §1B(a), Needham became part of BECo's exclusive service territory, to be altered only on a case-by-case basis based on mutual agreement of the neighboring distribution companies. See MBIS Report at 41.

Although Needham is part of BECo's historic service territory, streetlights on a portion of the property now known as Lot 2 were served by WMLP through Babson on July 1, 1997. Olin and WMLP argue that this service places Olin's campus within the territory actually served by WMLP on July 1, 1997 (Olin Reply Brief at 8; WMLP Brief at 6). BECo counters that the property in question is entirely within Needham, which is part of the territory served by BECo on July 1, 1997 (BECo Brief at 11). With respect to the Legislature's use of the term "actually served" in G.L. c. 164, § 1B(a) with reference to service territories, the Department concluded that it is meant to "encompass the municipality in which a distribution company is operating, versus the physical area reached by the lines of that utility." MBIS Report, at 37.

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<sup>10</sup>(...continued)

Brief at 6). In each case, however, BECo either consented to or requested that WMLP provide electric service (BECo Brief at 28).

<sup>11</sup> Although the parties' arguments have focused almost exclusively on Lot 2, the Olin campus is part of a larger parcel of land located within Needham. BECo's past electric distribution service has extended and still extends to five or more building on Olin's present Needham campus. BECo's service to those buildings pre-existed by several decades the establishment of Olin's Needham campus (Exh. OC-2, at 5). The propriety of BECo's provision of distribution service to these buildings is not in dispute (Petition at 8, Olin Reply Brief at 3-4).



Therefore, WMLP's service through Babson to a portion Lot 2 on July 1, 1997 alone is not sufficient to bring the Olin campus within WMLP's service territory.

When the property at issue was owned by Babson, WMLP was able to provide service to the streetlights located in Needham because the property now known as Lot 2 was then part of a larger, uninterrupted parcel of land straddling a municipal boundary. When an uninterrupted parcel of land straddles a municipal boundary between two service territories, the owner or lessor of the parcel may have an opportunity to choose its electric distribution service provider. See D.T.E. 98-122, at 8. However, since July 1, 1997, the parcel has been reconfigured and no longer straddles the municipal boundary. The buildings at dispute in this proceeding are entirely new construction in Needham. All of Olin's electricity consumption occurs in Needham (Exhs. BE-20; BE-1-21). No structures that received service from WMLP through Babson on July 1, 1997, now exist on Lot 2. As a result, unlike the factual situation in Massachusetts Electric Company, it is possible for the Department to conform the service territory boundary to the municipal boundary in this case without an anomalous result. For these reasons, the Department finds that the Olin campus is within BECo's exclusive service territory.

We next address issues with respect to "creative conveyancing."<sup>12</sup> In D.T.E. 98-122, at 11, the Department cautioned against the manipulation of lot or parcel boundaries in an effort to artificially defeat § 1B(a) by creating a straddling customer. BECo contends that Olin's

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<sup>12</sup> In D.T.E. 98-122, at 11, the Department described "creative conveyancing" as a circumstance where a customer engages in a land conveyance or a lot merger in an effort to get around or defeat the central intent of G.L. c. 164, § 1B(a).

October 31, 2001 purchase of a 1,000- square foot parcel of land in Wellesley is just such an effort. BECo argues that this purchase, made a year and a half after the original purchase by Olin of 70 acres in Needham and just nine days before the filing of the petition in this case, was made for the sole purpose of allowing Olin to claim that it was a border customer entitled to take service from WMLP from its land located in Wellesley (BECo Brief at 35). Olin disputes that it engaged in conveyancing for the purpose of creating some property rights in WMLP's service territory, and instead argues that, from an engineering perspective, it is most efficient for it to take service from WMLP in Wellesley (either on its 1,000-square foot parcel or other property owned by Babson) (Olin Brief at 41-42; Olin Reply Brief at 18; WMLP Brief at 18-19; WMLP Reply Brief at 15-16).

Olin originally planned to take electric service from WMLP via Olin-owned conduit and WMLP-owned distribution line. That line was to pass through Babson-owned real property in Wellesley, then through Olin's 1,000-square foot parcel in Wellesley, and, from there, onto the abutting Olin campus in Needham (Exh. OC-1 at 5; Olin Petition at 6). Olin's parcel in Wellesley was intended as the location for Olin-owned switchgear to effect a connection with WMLP through Babson (Exh. OC-1 at 5). Despite the original intent of the October 31, 2001 conveyance, Olin evidently has abandoned its plan to locate its switchgear on its parcel in Wellesley (Olin Brief at 33). The Wellesley parcel appears otherwise unbuildable and Olin currently has no plans for its use (Exhs. BE-1-1B Att.; OC-2, at 9; BE-1-5, Supp.; Tr. 1, at 38-39).

Because Olin has abandoned any plan to establish itself as a customer straddling the Needham-Wellesley boundary, the Department need not make any specific findings with respect to “creative conveyancing” here. Instead, the Department again cautions that petitions “based on lot or parcel boundaries, which have been reconfigured since July 1, 1997 to bring part and, arguably, therefore effectively all of a customer’s premises into a different service territory, will labor under a considerable burden to show that allowing the petition does not thwart Legislative intent.” D.T.E. 98-122, at 11.

Having determined that the Olin Campus is within BECo’s exclusive service territory, we must next determine whether to weigh certain policy arguments in favor of allowing Olin to choose WMLP as its electric service provider. Olin and WMLP raise several policy considerations and cite pre-Restructuring Act precedent<sup>13</sup> to support the provision of electric service by WMLP. BECo argues, however, that these policy arguments are irrelevant because the Department can and should resolve this service territory dispute by following municipal boundaries, as provided by G.L. c. 164, § 1B(a).

As the Department stated in D.T.E. 98-122, at 7, we have limited discretion to depart from municipal boundaries in resolving service territory disputes “if facts and fairness so warrant.” With respect to the specific policy arguments, Olin and WMLP contend that WMLP’s facilities are closer and do not require a system upgrade, the cost of which could be as much as \$1,600,000 (Olin Brief at 2; WMLP Brief at 24). BECo, however, contests these costs. BECo argues that it provides service to several neighboring customers, and is ready,

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<sup>13</sup> See, e.g., Ecological Fibers, Inc., D.P.U. 85-71 (1985).

willing, and able to serve Olin (BECo Brief at 19-20). Olin and WMLP also argue that there are significant annual cost savings from taking service from WMLP. In addition, Olin and WMLP argue that WMLP has greater service quality reliability. Finally, Olin contends that taking service from WMLP allows it to implement collaborative activities with Babson that yield other efficiencies for both colleges. BECo disputes these contentions (BECo Brief at 36-37).

The record evidence in this matter does not support finding any facts warranting a Department-authorized departure from BECo's defined service territory or relieving BECo of its statutorily mandated "exclusive obligation to provide distribution service to all retail customers within its service territory," including the Town of Needham and petitioner Olin. G.L. c. 164, § 1B(a); 220 C.M.R. § 11.04(2)(a). Other evidence has been presented to, and other findings of fact urged upon, the Department. But much of this is not relevant to issues material to G.L. c. 164, § 1B(a).

In D.T.E. 98-122, at 11, n.8, the Department distinguished the pre-Restructuring Act precedent relied upon by Olin and WMLP. Although prior precedent may remain instructive, the Department's discretion is now limited by G.L. c. 164, §1B(a) which clearly states Legislative policy. Because this dispute can be resolved pursuant to G.L. c. 164, §1B(a) by following a municipal boundary without giving rise to anomalies, the Department will not weigh any additional policy considerations in determining which distribution company can serve Olin.

## V. OUTSTANDING PROCEDURAL MATTERS

### A. Motion for Status Quo Ante

#### 1. Introduction

On January 31, 2002, BECo filed a motion to maintain the status quo ante (“Motion”) seeking (1) an immediate end to the provision of temporary electric distribution service to Olin by WMLP, (2) the cessation of any installation of permanent facilities to provide electric service to Olin by WMLP, and (3) the removal of any temporary or permanent facilities already in place (Motion at 1-2, 13). Olin and WMLP filed oppositions (“Opposition”) to the Motion on February 7, 2002.

#### 2. Positions of the Parties

##### a. BECo

BECo contends that the relief sought in its Motion is necessary so that no party will have its position improved while the underlying issues are being determined by the Department (Motion at 5). BECo argues that, without Department approval, Olin has been taking service in some manner from WMLP, although BECo contends that it has the exclusive right to serve customers in Needham (Motion at 1).

##### b. Olin

Olin argues that BECo filed its Motion as a means to enhance its position in this dispute (Olin Opposition at 5). Olin contends that an approval of the Motion would improve BECo’s position by requiring Olin to abandon its temporary facilities and to incur significant expenses to obtain temporary service from BECo (id. at 2, 5). Olin argues the relief sought in the

Motion is not appropriate because its temporary service lines have been in place for more than a year and WMLP served the lot in question when it was owned by Babson (id. at 3, 4). Finally, Olin argues that there is no emergency warranting such a Motion, and that the Department has the ability to render its final decision in this matter without regarding to what entity is providing temporary electric service (id.).

c. WMLP

WMLP opposes the Motion, arguing that BECo seeks an expedited determination of facts properly under investigation in the present matter (WMLP Opposition at 1). WMLP contends that the filing of the Motion is an effort by BECo to force the Department to issue a premature decision without allowing Olin an opportunity to fully present its case (id. at 3). Further, WMLP argues that the Department lacks authority to grant BECo's Motion for the following reasons: (1) Olin is not WMLP's customer; (2) WMLP has not received payment from Olin for any electric service; and (3) WMLP has not constructed any new distribution facilities in Needham as a service provider to Babson (id. at 1-2).

3. Analysis & Findings

BECo raises several issues for consideration in its Motion, all directly related to the main issue being litigated in this case, namely whether WMLP or BECo may provide electric distribution service to Olin in Needham pursuant to G.L. c. 164, § 1B(a). A motion for status quo ante, by definition, seek that status occurring before the current status. In certain circumstances, it may be appropriate to preserve the status quo pending the outcome of a Department proceeding in order to prevent a party from having its position improved or its

rights prejudiced while the underlying issues are being litigated. See, e.g., MCI Worldcom, Inc., D.T.E. 97-116-B at 10 (1999). Although BECo provides distribution service to Needham, it has never provided service to Lot 2. Thus, by seeking the status quo ante, BECo requests that the Department make an expedited determination that it has an exclusive right to serve Needham and that Olin should not be accorded the opportunity to choose WMLP as its electric distribution service provider.

At the time the Motion was filed, discovery was being conducted and evidentiary hearings had not yet taken place. In this instance, the relief sought by BECo involves a determination of the main issues for resolution in this docket and is not susceptible to immediate emergency relief. By declining to rule on the Motion in an expedited manner as requested by BECo, the Department has, in effect, denied BECo's Motion. With the Department's issuance of this final Order rendering the issue moot, no further action is required on the Motion.

B. Motion to Join Babson

1. Introduction

On February 12, 2002, BECo filed a motion to join Babson as a necessary party to this proceeding ("Joinder Motion"). Babson, Olin, and WMLP each filed an opposition ("Joinder Opposition") to the Joinder Motion.

## 2. Positions of the Parties

### a. BECo

BECo alleges that Babson, which distributes power throughout its own campus, also distributes electricity to Olin in violation of G.L. c. 164 (Joinder Motion at 2-4). BECo contends that because Babson plays a central role in the dispute with Olin and WMLP, adequate relief cannot be accorded without joining Babson as a party (id. at 2, 6). Therefore, BECo argues that Babson is a necessary party to this proceeding and should be joined by the Department.

### b. Babson, Olin, and WMLP

Babson, Olin, and WMLP each filed an opposition to the Joinder Motion arguing that it is unnecessary to join a party merely because of the potentially useful information the party can offer (Babson Joinder Opposition at 4; Olin Joinder Opposition at 4; WMLP Joinder Opposition at 3). Each contends that, because the underlying dispute is between BECo and WMLP, Babson is not a necessary party with rights, duties, or privileges to be determined by the outcome of this proceeding (Babson Joinder Opposition at 1, 4; Olin Joinder Opposition at 3, 4-5; WMLP Joinder Opposition at 3). Finally, each argues that joining Babson as an unwilling participant is beyond the scope of the Department's authority (Babson Joinder Opposition at 3; Olin Joinder Opposition at 3; WMLP Joinder Opposition at 2).

## 3. Analysis & Findings

The Department's regulations at 220 C.M.R. § 1.03(2) define a "party" as (a) the specifically named persons whose legal rights, duties, or privileges are being determined in an



adjudicatory proceeding before the Department; (b) any other person who as a matter of constitutional right or any provision of the Massachusetts General Laws is entitled to participate fully in such proceeding and who enters an appearance; and (c) any other person allowed by the Department to intervene as a party. There is no specific provision in the Department's regulations regarding the joinder of necessary parties. However, under the Massachusetts Rules of Civil Procedure, a party may be joined if its absence prevents complete relief among those already parties.<sup>14</sup> See M.R.C.P. 19(a). The petition before the Department seeks a determination of whether Olin may take distribution service from WMLP or BECo. No legal rights, duties, or privileges of Babson are being determined in this adjudicatory proceeding. As the issuance of our final Order today evidences, it is not necessary to join Babson to ensure complete relief among those already parties. Therefore, BECo's Joinder Motion is denied.

Although we have found that it is not necessary to join Babson as a party to this case, the Joinder Motion does raise the issue of whether Babson has been distributing electricity to Olin in violation of G.L. c. 164, § 1. General Laws c. 164, § 1 defines distribution as "the delivery of electricity over lines which operate at a voltage level equal to or greater than 110 volts and less than 69,000 volts to an end-use customer within the [C]ommonwealth" and confirms that "[t]he distribution of electricity shall be subject to the jurisdiction of the [D]epartment." Since January 2000, Olin has been receiving temporary electric service from

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<sup>14</sup> When administrative rules governing procedure are silent, agencies are not precluded from electing to follow the rules by analogy. See Union City Body Co., Inc. v. Lambdin, 569 N.E. 2d 373, 373-374 (1991); Joyce Sportswear Co. v. State Board of Tax Commissioners, 684 N.E. 2d 1189, 1193 (1997).

WMLP, via Babson, for the construction of its buildings on Lot 2 (Tr. 1, at 69, 95; Babson Joinder Opposition at 2; Olin Joinder Opposition at 2). The voltage capacity of this service ranges from 120 to 480 volts (Exh. BECo 3-3). The cost of Olin's electric service is paid by Babson to WMLP (Exh. BE-1-7; Tr. 1, at 106).<sup>15</sup>

From the nature of these transactions, it appears that Babson has been distributing electricity to Olin within the definition of § 1, even if only on a temporary basis. General Laws. c. 164, § 1B(a) provides that "no other person shall provide distribution service within such service territory without the written consent of such distribution company which shall be filed with the department and the clerk of the municipality so affected." Babson has confirmed that it will "play no role" in Olin's receipt of permanent electric service and Olin had agreed to abide by any ruling of the Department that BECo should serve its new campus (Babson Joinder Opposition at 3; Olin Joinder Opposition at 5, n.6). Therefore, we determine that it is unnecessary for the Department to take any further action on this issue at this time.

#### VI. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: that Franklin W. Olin College of Engineering's Petition for approval to receive electric service from Wellesley Municipal Light Plant is DENIED; and it is

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<sup>15</sup> There is record evidence to suggest that consideration is being exchanged between Babson and Olin with respect to Babson's provision of electricity (Exh. BE-1-7; Tr. 1, at 105-107). The statutory definition of distribution does not reference the sale of electricity. See G.L. c. 164, § 1. Therefore, whether or not a sale is occurring, a person distributing electricity to a third party is subject to the Department's jurisdiction.

FURTHER ORDERED: that Boston Edison Company shall serve Franklin W. Olin College of Engineering's facilities located in Needham.

By Order of the Department,

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Paul B. Vasington, Chairman

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).